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Chairman: Mr. Politi ..... (Italy)

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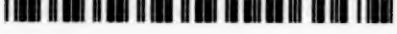

The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session *(continued)* (A/55/10)

1. **Mr. Abraham** (France) expressed concern at the late issuance of the report of the International Law Commission (A/55/10); the availability of Commission documents on the latter's web site, while practical, could not replace their publication in all official languages of the United Nations. The Secretariat should inform States in a timely manner of any problems encountered in that regard.

2. Turning to the question of State responsibility, he said that he welcomed the decision to abandon the concept of internationally wrongful acts under international law as were comparable to crimes and delicts under criminal law (original draft article 19). He agreed with the Special Rapporteur's decision not to dwell on the problem of defining primary rules and hoped that the Commission would confine itself to the codification of secondary rules. He was also in favour of the inclusion, albeit implicit, of a reference to damages in the definition of the injured State.

3. The structure of the draft articles was generally acceptable; however, Part One was too general and might better be entitled "Acts precipitating State responsibility".

4. He reiterated his delegation's objection to draft article 40, which made no reference to material or moral damage to a State arising in consequence of the internationally wrongful act of another State. It was also important to make a clear distinction between the injured State and States which had only a legal interest in the performance of an obligation and to explain the reasons for that distinction.

5. Draft article 43 (a) should make it clear that the obligation in question was of a bilateral nature; it was not sufficient to make that point in the commentary. His delegation did not agree with the members of the Commission who had suggested that third States should be permitted to intervene in cases involving violation of a bilateral obligation if the State directly affected did not wish to respond.

6. Draft article 43 (b) should include specific mention of the damage suffered by the "specially affected" State and of the fact that such damage could include that which resulted from the breach of an obligation which affected States' enjoyment of their rights or performance of their obligations. The meaning of the words "the international community as a whole" was unclear; the wording of draft article 41, which spoke of "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests", should be repeated in articles 43 and 49. In any case, his delegation would prefer "the international community of States as a whole", used in article 53 of the 1969 Vienna Convention on the Law of Treaties. It remained to be established whether the obligations stemming from the language used in article 41 were obligations *erga omnes*, as would appear from the Commission's discussions, and what such obligations would include in the context of the draft articles.

7. Draft article 49, paragraph (1), could be improved by explicit recognition that the States described therein should be qualified as "injured" in that their right to the protection of a collective interest had been violated under an instrument by which they were bound. The proposed wording made it difficult to distinguish between injured States and those which had only a legal interest. It would be better for draft article 49, paragraph 1 (a), to follow draft article 43 (b) or for the Special Rapporteur to make it clear that States with only a legal interest could seek cessation of another State's violation but could not seek reparation for damage caused by an internationally wrongful act by which they were not directly affected. Paragraph 2 (b) should therefore be deleted.

8. There had been significant developments in international law since the first reading of the draft articles; the Statute of the International Criminal Court provided for the trial and conviction of those responsible for the serious crimes referred to in original article 19 and removed all justification for the argument that a State could be guilty of a crime. State responsibility under international law was sui generis; it was neither civil nor criminal in nature. He therefore welcomed the Commission's current approach to the issue and encouraged it to continue along those lines.

9. Draft article 41 referred to "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests". Although the concept had a basis in *jus cogens* and in the decision of the International Court of Justice in the *Barcelona Traction*

case, the exact meaning of the "fundamental interests" of the "international community" remained unclear. In any case, the primary problem lay in the consequences covered by draft article 42; paragraphs 1 and 2 (a) and (b) served no purpose while paragraph 2 (c) was ambiguous and might encourage States to resort to possibly excessive countermeasures in defence of the obligations referred to in draft article 41. In the unlikely event that draft articles 41 and 42 were retained, consideration should be given to placing them elsewhere in the draft, perhaps at the end of Part One, Chapter III.

10. He welcomed the decision not to link the taking of countermeasures to compulsory arbitration, which would amount to giving only the responsible State the right to initiate arbitral proceedings. Generally speaking, the draft articles on State responsibility should cover only reparation for damages and cessation of internationally wrongful acts; the issue of countermeasures should be considered separately by the Commission. However, his Government agreed with the Special Rapporteur's comments on the need to cover both the proportionality and the termination of countermeasures.

11. He welcomed the decision to delete the provisions on dispute settlement; there was no need for a special regulatory mechanism in disputes raising questions of responsibility, which could be resolved under general international law.

12. Although his Government had not yet taken a position on the final form that the draft articles should take, he was not certain that the adoption of a declaration by the General Assembly would be the best solution. A convention would have greater regulatory force and would be more in keeping with the Commission's mandate to develop normative instruments rather than indicative guidelines. Moreover, the adoption of a declaration might cause the rules established in the draft articles, some of which were quite innovative, to be cited as principles without prior implementation in State practice and thus lead to the convening of an international conference to consider their validity.

13. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) stressed that countermeasures should not be used by powerful States as a means of coercing smaller nations. Draft article 50, paragraph 2, should be amended to make it clear that an injured State could not take measures against third States in order to induce the responsible State to comply with an obligation. His delegation would prefer to restore the wording of draft article 50 (b), on first reading, which stated that an injured State should not resort by way of countermeasures to "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act"; that wording reflected language commonly used in General Assembly resolutions and contained a principle important to developing States. Furthermore, he disagreed with those who considered that there was no need to refer to "political independence of the State", since that was implicit in "territorial integrity"; Article 2, paragraph 4, of the Charter of the United Nations made a distinction between those two principles, which were not interchangeable.

14. In its current form, draft article 51, paragraph 2, could be taken to imply that the imposition of countermeasures could precede recourse to dispute settlement procedures, thereby allowing powerful States to take countermeasures in order to impose their will regarding the selection of such procedures.

15. Draft article 52 should be simplified; the reference to "the gravity of the internationally wrongful act" should be deleted, as it suggested that the State taking countermeasures was authorized to gauge the proportionality of its own act.

16. Draft article 53 should be amended to make it clear that allegations of an internationally wrongful act must be substantiated by credible evidence before the injured State could take countermeasures. Paragraph 3 and the reference thereto in paragraph 4 should be deleted, since countermeasures were by nature provisional and injured States must not be given occasion to neglect their obligation of notification and negotiation under paragraph 2.

17. It would be better to devote a separate article to the current draft article 54, paragraph 2, as the Special Rapporteur had originally proposed, and to state that where there had been a serious breach of an essential obligation owed to the international community as a whole, countermeasures must be coordinated by the United Nations.

18. Ideally, the draft articles, with the addition of a chapter on the peaceful settlement of disputes, should be adopted as a convention and acceded to by the

overwhelming majority of Member States. However, such an approach would require the convening of an international conference, at which all the articles would be subject to negotiation and compromise, years might pass before the resulting instrument achieved a sufficient number of signatures for entry into force. Adoption of the draft articles as a declaration by the General Assembly might be preferable; the Commission could facilitate the achievement of that objective by producing a balanced instrument incorporating the views of all Member States. Moreover, such a declaration would not preclude the elaboration of a convention on State responsibility in the future. In any event, after nearly five decades of deliberation, the Commission should complete its work on the project during the current quinquennium.

19. **Mr. Baker** (Israel) said that in his report on State responsibility, the Special Rapporteur had made a clear and extensive analysis of the topic, itself an important contribution to international legal scholarship in the field. Many improvements in the text of the draft articles reflected comments made in the Committee and an attempt to adhere more closely to existing customary law and the actual practice of States. That was a commendable approach, because State responsibility was part of the infrastructure of international law, and the focus should therefore be on codification rather than progressive development. Unless the new rules reflected existing customary law, States would be reluctant to support them.

20. He had reservations about the wording of draft article 16 (b), which implied that a State which facilitated or assisted in the breach of an obligation by another State would not be committing a wrongful act if the obligation in question was not binding upon it. That wording effectively sanctioned assistance to wrongdoers in certain cases. It might be preferable to opt for the wording of draft article 2, as adopted on first reading, which avoided that interference. He expressed similar reservations with regard to draft articles 17 and 18. Draft article 17 implied that a State could direct and control another State in the commission of a wrongful act, as long as that act was not wrongful for itself. Draft article 18 would seem to allow a State to coerce another State to commit an act which, although not wrongful for the coerced State, might well be wrongful for the coercing State. He suggested reviewing those provisions.

21. He regretted the failure to retain in article 20 the exception regarding the ineffectiveness of consent in cases of peremptory obligations, which was an important principle of international law. As for forms of reparation, he pointed out that the modalities cited as examples of satisfaction in article 38, paragraph 2, all shared similar characteristics and that it would therefore be useful to cite other examples, such as nominal damage and disciplinary or penal action, with a view to better expressing the range of options available in cases where satisfaction was deemed necessary.

22. Concerning the matter of interest, now covered in article 39, he reiterated his delegation's previous view that interest should be regarded as an integral part of compensation, in which case the issue should be incorporated into the existing article on compensation. In addition, the stipulation that interest was payable only "when necessary in order to ensure full reparation" was unwarranted insofar as it was difficult to envisage a situation where interest would not be due.

23. Turning to the most contentious aspect of the draft articles, relating to the invocation of responsibility by States other than the injured State, he welcomed the decision to set aside the distinction between crimes and delicts and refine the distinction between the States directly affected by a breach and those with an interest in the performance of an obligation. Such a change was essential to ensuring that the draft articles accorded with contemporary State practice and customary law and that they received the widest support.

24. Nevertheless, the draft articles did not go far enough in applying the consequences of that change to the issue of the invocation of responsibility. The definition of serious breaches of essential obligations to the international community contained in article 41 was so general as to be open to dangerous abuse by States purporting to act in the interests of the international community. Similarly, the obligation contained in article 42, paragraph 2 (c), for States to cooperate as far as possible to bring such breaches to an end was too broad, as well as unsupported by international law, and might also undermine existing collective mechanisms designed to regulate and coordinate international responses to serious breaches. In such cases, it was inappropriate and unwise to impose a general and unspecified legal obligation upon third States.

25. In his view, the legal capacity of interested States, as opposed to injured States, was currently limited to their ability under customary law to call for the cessation of unlawful conduct and for reparation to be made to the injured State. He supported neither the implication in article 49, paragraph 2, that interested States could act as a kind of trustee for the injured State in seeking reparation, nor the general position adopted in article 54 according to which States could engage in countermeasures, as such provisions would have a destabilizing effect by creating a parallel mechanism for responding to serious breaches which lacked the coordinated, balanced and collective features of existing mechanisms. In that regard, he wished to echo the statements already made to the effect that those provisions went beyond existing law and were unwarranted.

26. The deletion of the distinction between crimes and delicts had not resolved the controversy regarding the legal consequences of serious violations of international law. Instead, the debate on such matters had merely been transferred from article 19 to those provisions dealing with the invocation of responsibility by non-injured States. He therefore recommended that all controversial aspects of that issue should be set aside with a view to separate treatment pursuant to developments in international law and practice by way of a saving clause, for example, which would not diminish the usefulness of or impair the overall structure of the draft articles. He also felt that the present location of the articles on that subject throughout Part Two and Part Two bis confused the otherwise logical division of the draft articles. He therefore proposed that the matter should be brought to the attention of the Drafting Committee.

27. **Mr. Gupta** (India) observed that because of the tireless efforts of the Special Rapporteur, the Commission had almost completed its second reading of the draft articles. However, several issues still required careful consideration, such as State responsibility for breaches of obligations *erga omnes* and the suitability of the substitution made for draft article 19 adopted on first reading. The overlap between a breach of multilateral obligations and the legal consequences of wrongful acts, and their relationship with the Charter of the United Nations, also called for in-depth consideration. He hoped that when finalizing the draft articles, the Commission would draw an appropriate distinction between State responsibility as such and liability for transboundary damage from hazardous activities, for which the operator of the activity was primarily responsible.

28. The changes to the draft articles recommended by the Drafting Committee at the end of its recent session were generally acceptable. He expected the Commission to elaborate further the principle of exhaustion of local remedies, referred to in the new draft article 45, in the context of its work on diplomatic protection.

29. The question of the right of States to take countermeasures was open to serious abuse. He would have preferred to exclude that question altogether from the scope of State responsibility, leaving issues concerning such measures to be dealt with under general international law, especially under the Charter of the United Nations. He welcomed the restrictions placed on countermeasures in draft articles 51, 52 and 53. Countermeasures were merely sanctions under another name. They should not be used to punish a State, and their humanitarian consequences and the need to protect civilian populations from their adverse effects must be kept in mind. Paragraph 5 of draft article 53 was unclear. In his view, countermeasures could not be taken and, if taken, must be immediately suspended, if an internationally wrongful act had ceased or if the dispute had been submitted to a court or tribunal with authority to hand down binding decisions. Moreover, there was no provision in the draft articles to ensure that countermeasures did not have adverse effects for States other than the one targeted.

30. The distinction sought to be made between an injured State as defined in draft article 43 and in draft article 49 appeared to turn on the phrase "is of such a character as to affect" in draft article 43 (b) (ii). It was therefore implied that in the case of integral obligations all States were affected, and in the case of a collective interest, States not directly affected were interested only in the performance of an obligation. That was too subtle a distinction between the two categories of States, and should be reviewed in order to avoid unnecessary confusion and possible abuse. The difference between "integral obligations" and "collective interest" also required further elucidation.

31. Draft article 31, paragraph 2, defined injury in a very broad sense, since moral injury could include non-material damage as well as legal injury. The causal link

between the wrongful act and the injury suffered was determined by the primary rule, so the facts had to be known before the distinction between directly injured States and other States could be ascertained. The definition of injury allowing for the right of States to invoke the responsibility of another State for wrongful acts committed against the collective interest was a new and evolving concept in international law. The concept of obligations *erga omnes* was indeterminate and raised difficult issues concerning the requisite legal interests and the standing of States in a particular situation. States and other members of the international community practised a form of global networking; however, that did not necessarily equate to an international community with identified rights of its own. A general provision enabling more than one State to invoke the responsibility of another in respect of a wrongful act could give rise to serious abuses until there was a definition of "collective interests" and the means of implementing and enforcing them.

32. The same difficulties attached to draft article 41, which replaced the former article 19, dealing with the concept of an "international crime". Moreover, it was for the international community itself, acting through a unanimous or nearly unanimous decision, in a forum which admitted of universal participation by States, to determine the essential obligations for the protection of its fundamental interests. He recommended the deletion of draft article 41; retaining it might invite the criticism that the Commission was engaged in drafting a primary rule, thereby exceeding its mandate.

33. According to draft article 49, paragraph 2, any State other than an injured State could seek the cessation of an internationally wrongful act, as well as assurances and guarantees of non-repetition. It was not clear, however, whether the actions of such a State had to be subordinated to, and coordinated with, the response desired by the directly injured State, or whether the former State could act independently, albeit in the interest of the directly injured State.

34. He could accept the treatment in Part Two of the legal consequences of an internationally wrongful act and the various forms of reparation. It should be made clear, however, that the latter did not occur automatically but were essentially options available to the injured State to seek from the responsible State at its own discretion.

35. In conclusion, he emphasized that it would be helpful to state explicitly that the draft principles on State responsibility were residual in character and would come into play only if and to the extent that the primary rule or special regime agreed to by the State concerned had not specified the consequences of a breach of obligations.

36. **Mr. Lavalle-Valdés** (Guatemala) said that draft article 2 would be improved by inserting after the word "when" the phrase "none of the circumstances excluding wrongfulness according to chapter V of this Part are present".

37. With regard to draft article 10, he thought it might be advisable to restore paragraphs 1 and 2 of article 14 adopted on first reading. Paragraph 1 of draft article 10 did not deal with movements other than insurrectional movements. However, paragraph 2 of that article seemed to imply that such a movement could establish a new State throughout the territory of the former State. It did not seem reasonable to suppose that it could acquire jurisdiction over a part but not the whole of the State. He therefore suggested inserting the words "or other" after "insurrectional" in paragraph 1.

38. Paragraph 1 of draft article 15 would express more clearly the intention of the drafters if the words "defined in aggregate as wrongful" were replaced by "capable of being regarded in aggregate as wrongful".

39. The rules in chapter IV of Part One were presented as secondary rules, but were essentially primary rules, and he thought it might be better to delete the chapter. In any event, chapter IV did not cover all the subject matter indicated by its title, since there was no rule on the effects of a guarantee given by a State for the international obligations of another State. Paragraph (b) of draft article 16 enabled a State to assist another to commit acts which were internationally wrongful for the latter State but would be lawful on the part of the former. That did not comply with the most basic requirements of justice. For instance, if State A had a treaty obligation towards State B to allow certain products to enter its territory, and it imposed a prohibition on them in breach of that obligation, it might be assisted through a similar prohibition by a State C bordering upon it which did not have the same obligation but knew the prohibition was unlawful for State A. The same could be said, mutatis mutandis, of paragraph (b) of draft article 17 and paragraph (a) of draft article 18. In most cases,

coercion of another State would in itself be unlawful, since it would normally involve unwarranted interference with the internal or external affairs of that State, or the implied threat of the use of force. Thus paragraph (b) of draft articles 16 and 17, and paragraph (a) of draft article 18, should all be considered afresh.

40. In draft article 21, he would like to see a reference to decisions taken by the Security Council under Chapter VII of the Charter.

41. He had some difficulty with chapter II of Part Two. It contained three draft articles, 36, 37 and 38, dealing with the three types of reparation — restitution, compensation and satisfaction. However, draft article 39 seemed to specify payment of interest as a fourth type. Draft article 39 should become paragraph 3 of draft article 37.

42. The reference in paragraph 1 of draft article 49 to responsibility under paragraph 2 was misplaced, since paragraph 2 conferred a right and did not impose conditions. The reference should be to paragraph 3. In paragraph 2 (b), the phrase "in the interest of the injured State or of the beneficiaries of the obligation breached" appeared to be a kind of *negotiorum gestio*. However, it should perhaps be confined to cases in which the injured State was not in a position to exercise its right to invoke responsibility under draft article 49. In draft article 50, paragraph 3, the words "the resumption of performance of the obligation or obligations in question" should be replaced by "subsequent compliance with the obligation or obligations in question", since some of the obligations might be instantaneous in character, for instance the payment of a sum of money.

43. He had two concerns relating to chapter II of Part Two bis. First, because of the imbalance in the economic and other forms of influence between different States, the effectiveness of recourse to countermeasures would vary considerably, and it was possible that the countermeasures would aggravate the negative consequences of such inequalities. Secondly, the use of countermeasures might seriously exacerbate tension between States parties to a dispute. State A might impose countermeasures for a breach of international law imputed by itself to State B but not demonstrated in a manner opposable to State B, and State B might reject the imputation on the basis that the countermeasures were illicit, in turn imposing countermeasures on State A, which might retaliate in similar manner. He joined with the representatives of the United Republic of Tanzania and the Islamic Republic of Iran in preferring the provision in the draft adopted on first reading, which forbade the use of countermeasures involving extreme political or economic coercion such as might endanger the territorial integrity of political independence of the State subject to the coercion.

44. The issue of "remoteness of damage" had not been resolved in the draft articles. The omission should perhaps be remedied, although he doubted whether primary rules existed in most cases to cover the point.

45. **Mr. Janda** (Czech Republic) said that he welcomed the deletion of former article 19, in which connection his views closely mirrored those expressed by the representative of Germany. He did not, however, share the concerns which had been voiced in connection with the principle of non-repetition covered in article 30, and he thus supported its incorporation in the draft articles on State responsibility, since it still had a place, albeit limited, in daily diplomatic practice. He also believed that any effort to distinguish that principle as a political statement or a legal term was more relevant in the context of the Commission's work on unilateral acts.

46. In the context of State responsibility, assurances of non-repetition were closely and logically related to the obligation to cease the wrongful act and could, in some contexts, offer tangible proof that the State having committed an internationally wrongful act recognized its unlawful conduct. He marginally preferred the wording of the text proposed by the Drafting Committee to that proposed by the Special Rapporteur, as it reflected cessation and non-repetition as two separate concepts. He was honoured that the words "if circumstances so require", proposed by his delegation, had been included in article 30 (b), as the dependence of the concept on the particular context was now better expressed as a result.

47. In regard to reparation, the two vital questions were, first, whether it was realistic and justifiable to aim for full reparation as opposed to simply as much reparation as possible to remedy the consequences of the wrongful act, and secondly, whether the forms of reparation should be prioritized. History had proven that insistence on full reparation could sometimes do more harm than good. Equally, however, such mistakes did not prove the principle of full reparation to be

wrong. On the contrary, the principle per se had no defects and there was no reason to depart from it. The concept of full reparation was also directly related to former article 43, paragraph 3, which provided that reparation should not deprive the population of a State of its own means of subsistence. In his view, the two approaches were not contradictory and could therefore coexist. Application of the principle of full reparation should be limited, however, in order to ensure the protection of items required for livelihood.

48. As for the priority assumed by the forms of reparation, monetary compensation was clearly important, particularly since it was often politically difficult for States to return expropriated property, which was often the subject of disputes. In his view, therefore, restitution remained valid as a primary means of reparation, and compensation should serve as a secondary instrument only when restitution was impracticable. Although such a succession of forms of reparation was sufficiently expressed in the draft articles adopted by the Drafting Committee, the rule of priority should also be reflected in the provision contained in article 42, paragraph 2, pursuant to which an injured State had full discretion to decide what form reparation should take. In his view, an injured State should first be obliged to demand restitution if it appeared to be materially possible.

49. As for satisfaction as the third form of reparation, he noted with concern that the concept of non-material or moral injury was absent from the text adopted by the Drafting Committee in deference to the view that the applicability of satisfaction would otherwise be too narrow and provide no scope for a right to satisfaction in the context of material injury. He was convinced, however, that satisfaction should be specially tailored to the reparation for an injury which had no material character. In the case of material injury, satisfaction might be an additional form of reparation accompanying restitution or compensation, but was hardly an alternative to the first two forms. In the case of material damage, satisfaction was neither proportionate nor sufficient. The linkage between satisfaction and non-material injury should therefore be retained.

50. Lastly, although he favoured incorporation of the concept of mitigation of responsibility into the draft articles, he questioned the legal precision of such a term, which he perceived as contradictory in that legal responsibility either existed or did not exist. In his view, the principle should be analogous with the concept of mitigating circumstances as applied in criminal law. In other words, in the context of State responsibility, a State's responsibility would not be mitigated, but the legal consequences of the wrongful act could be made less severe or intense for that State. He therefore proposed altering the words "mitigation of State responsibility" to read "mitigation of legal consequences of an internationally wrongful act".

51. **Mr. Lammers** (Netherlands) said he could agree to the deletion of the concept of an international crime, which had proved controversial. Its replacement, in Part Two of the draft, by a chapter dealing with serious breaches of essential obligations towards the international community as a whole was a compromise solution, adopted in order to avoid jeopardizing what had been achieved so far. Nevertheless, there was still a problem of definition. The Commission should examine more closely the concept of "serious breaches" in draft article 41, in order to find the most appropriate wording. The title of chapter III should be harmonized with the heading of draft article 42. The examples of international crimes listed in the former draft article 19 had been deleted. That might be regretted, although he understood the Special Rapporteur's wish to transfer such material to the commentary. The definition of "serious breaches" also affected a number of articles in Part Two bis on the implementation of State responsibility, to which his delegation would return in its written comments.

52. According to draft article 49, paragraph 2 (b), a State other than the injured State could seek from the responsible State compliance with the obligation of reparation under chapter II of Part Two. However, in the event of a serious breach of an obligation owed to the community as a whole one would also expect a provision allowing such a State to seek compliance under chapter III of Part Two, namely, damages reflecting the gravity of the breach in the interest of the injured State or of the beneficiaries of the obligation breached. He questioned the distinction drawn in draft articles 42 and 49 between the "injured State" and "States other than the injured State". It could be argued that all States were injured by the legal consequences of a serious breach of an essential obligation to the international community, although some might be specially affected. In the earlier version of the draft articles, in the case of an international crime the concept of "injured State" comprised all States.

53. With the deletion of the concept of an "international crime", the specific legal consequences included in the former draft article 52 had also been deleted. All that now remained of such consequences were "damages reflecting the gravity of the breach". The text should be more specific. Either article 52 or the commentary should include a provision that "serious breaches" called for damages exceeding the material losses suffered in consequence of the breach.

54. **Mr. Klingenberg** (Denmark), speaking on behalf of the Nordic countries, said that he attached great importance to the successful conclusion of the monumental project represented by the draft articles on State responsibility. Generally speaking, he was very satisfied with the streamlined draft articles adopted on second reading, which were a considerable improvement on those adopted on first reading in 1996. Notwithstanding further changes, they were, by and large, worthy of adoption as a legally binding convention.

55. He endorsed the new four-part structure of the draft articles, Part One of which presented no major difficulties, although the wisdom of introducing the qualification of "knowledge of the circumstances" in articles 16 to 18 was questionable in view of the fact that it was not specified as a requirement in article 2 concerning the elements of an internationally wrongful act. He also had ideas for streamlining articles 4 and 9, the details of which he would discuss on another occasion.

56. Chapters I and II of Part Two of the draft articles were particularly clear, concise and well structured, while Chapter III was an acceptable compromise, resolving the earlier distinction between delicts and crimes. In that connection, the essential point was that violations such as aggression and genocide were such an affront to the international community as a whole that it was vital to distinguish them from other violations.

57. The new Part Two bis was also a clear improvement on the previous draft, and Chapter I in particular read well. The somewhat controversial article 49 providing for the invocation of responsibility by States other than the injured State was acceptable to the Nordic countries, which regarded it as necessary in the context of the provisions concerning serious breaches of obligations to the international community as a whole.

58. Chapter II contained all the essential elements for regulating the sensitive issue of countermeasures, which was rightly placed in the context of implementing State responsibility rather than in that of circumstances precluding wrongfulness. While he was pleased that punitive actions were outlawed under article 50, paragraph 1, it was nevertheless crucial to establish strong safeguards against possible abuses of countermeasures. It was also vital to keep in mind the favourable advantage of powerful States, which were often the only States with the means to avail themselves of the use of countermeasures to protect their interests.

59. Noting that the current draft articles appeared to favour the resort to countermeasures, he said that he would like the provision contained in article 53, paragraph 5 (b), concerning the effect of binding settlement procedures on the taking of countermeasures to appear in a separate article immediately following article 50. He firmly believed that there was no room for countermeasures in cases where a mandatory dispute settlement procedure existed, except where that procedure was obstructed by the other party and where countermeasures were urgent and necessary to protect that party's interest in the event that the dispute had not yet been submitted to an institution with the authority to make decisions that could protect such interest. On that basis, article 51, paragraph 2, could become redundant. He would also prefer the adoption of a more negative approach in article 52 by substituting the words "be commensurate with" with the words "not disproportionate to" and omitting the final phrase of the provision. Lastly, he said that the four saving clauses contained in Part Four of the draft articles were acceptable to the Nordic countries.

60. **Mr. Skelemani** (Botswana) said that the statements on State responsibility had shown that almost all delegations felt that the international law governing State responsibility needed clarification. The Commission had produced work of high quality to that end, even if individual aspects were open to improvement. The draft articles should therefore be adopted in a form showing that the United Nations considered them a good compromise. The end document should be binding and accepted as a codification of established international law on the subject.

61. Turning to specific issues, he wondered whether the heading of draft article 49 was strictly correct. The

law should generally discourage States which had not been injured from becoming involved and crying more than the bereaved. According to his understanding, the State referred to in article 49, paragraph 1, was injured in the sense that the breached obligation protected a collective interest or the interest of the international community. In such a situation, however, no State should by itself, without the concurrence of at least a substantial number of other concerned States, invoke the responsibility of another State. Draft article 43 adequately covered the position of an injured State and there was no need for that State to act unilaterally if its interests were equally affected with those of other States.

62. When a State's interests were injured, it would want to protect its interests and should be allowed to do so. Draft articles 23 and 50 to 55, however, attempted to restrict the right to act in self-defence. The Commission might well be on the right track in trying to govern or restrict the exercise of countermeasures, but, in view of the right to self-defence, countermeasures could not be prohibited altogether. He supported the suggestion by the representative of the United Republic of Tanzania that a list of prohibited countermeasures would be useful.

63. A more glaring problem was that an interested State, even if not injured itself, might take countermeasures without even consulting the affected States. To that extent, the scope of draft article 54 was too wide. It was open to abuse by powerful States against a weaker State that they might particularly dislike for other reasons. The role of the one international policeman State should be controlled. A situation in which a State was both judge and jury should be avoided.

64. **Mr. Basabe** (Argentina) said that the Commission's work on State responsibility constituted a landmark in the codification of international law. The adoption of a distinction between primary and secondary rules had made it possible to avoid a whole range of theoretical and practical obstacles. In its final form the document should probably be adopted as a convention, if that was acceptable to a majority of States, although his Government could also support the option of adopting it as a declaration within a General Assembly resolution for the time being. A convention, however, even without universal participation, tended to have a greater impact than a declaration, since the danger with the latter was that it would fall into oblivion. There was no risk of such a fate befalling the draft articles on State responsibility, however, such was the importance and quality of the Commission's work.

65. The draft text had managed to deal satisfactorily with two of the most controversial aspects of the topic. It had been useful to jettison the expression "State crimes", which could have led to conceptual confusion in an area where caution was required. His delegation continued to believe, however, that there should be a special category of particularly serious breaches by a State of its obligations to the international community as a whole. It was important both to include a differentiated scale of responsibility according to the seriousness of the wrongful act and to reflect that scale adequately in the draft articles. The Commission had triumphantly achieved both objectives, without overloading the text. It was also gratifying that the Commission had recognized the need to distinguish between an injured State and another State with an interest in the situation, as his delegation had longed argued should be the case. Draft article 49 set out the situations in which a State other than the injured State was entitled to invoke the responsibility of another State and the procedure to be adopted for such invocation.

66. As far as countermeasures were concerned, his delegation believed that they should be resorted to only in exceptional circumstances, with due regard for prevailing circumstances within the international community and with every care to preserve a balance between the need for countermeasures and the need to avoid their abuse. Part Two bis, chapter II, set out the necessary limitations and conditions. The rules governing collective countermeasures should be even stricter than those governing bilateral ones. The rules in the draft articles were acceptable, in that they established reasonable restrictions.

67. Other observations or requests for clarification would be addressed directly to the Commission, which had by and large produced an excellent set of rules on State responsibility.

68. **Mr. Hoffmann** (South Africa), speaking on behalf of the Southern African Development Community (SADC), commented first of all on the newest topic before the Commission, Diplomatic protection. The Commission had correctly decided that the use of force to protect nationals abroad fell outside the scope of the topic, which was concerned only with

peaceful procedures for the protection of nationals. It had also been correct in deciding that State practice did not support a rule obliging States to exercise diplomatic protection on behalf of its nationals, even if they should be more active in protecting the human rights of their nationals abroad. There was a wealth of State practice, case law and academic writings on diplomatic protection. There had also been several attempts at codification.

69. Nevertheless, there was great uncertainty as to many of the rules governing the admissibility of claims. The Special Rapporteur had so far focused on questions of nationality, particularly the protection of dual and multiple nationals. The decision by the International Court of Justice in the *Nottebohm* case of 1955 raised more questions than it answered. While States should not be permitted to exercise diplomatic protection on behalf of nationals who had acquired their nationality by fraudulent or improper means, the *Nottebohm* decision went too far if it held that there should always be an effective and genuine link between the national and the protecting State. It would leave many individuals, who had acquired nationality by birth, descent or proper naturalization but had lived outside their national State for many years, with no State capable of exercising diplomatic protection on their behalf. Dual nationals presented a particular problem. While there was no objection if either State of which an individual was a national protected that individual against a third State, difficulties arose when one State of which an individual was a national wished to claim for injury to that individual committed by another State of which the individual was a national.

70. Traditionally, a State could not protect an individual against another State in such circumstances. Since the *Nottebohm* case, however, the position seemed to have changed and tribunals had upheld the right of the State with which the individual had the most effective link to bring a diplomatic claim against another State of nationality with which the individual had a weaker link. It was a development requiring careful consideration, particularly where the injured individual had obtained special privileges in the defendant State on account of his nationality. On the other hand, it was difficult to resist a right of diplomatic protection where the defendant State by law prohibited the individual from renouncing his nationality and the individual had an effective link with the new State of nationality. Such competing considerations should be carefully weighed and balanced in the formulation of any rule.

71. The Commission had shown some support for a rule allowing a State in which a stateless person or refugee had lawful and habitual residence to exercise diplomatic protection on behalf of that person. That accorded with developments in the field of human rights, but it must be made clear that there was no duty on the State of residence to exercise such protection, since it might deter States from providing asylum to refugees and stateless persons. Diplomatic protection was closely linked with the topic of State responsibility and it was therefore appropriate that the Commission should direct its attention to the former.

72. By contrast, there was a dearth of judicial decisions or State practice on the topic of unilateral acts of States. It was, however, an important topic. States should be more forthcoming with evidence of their State practice, for otherwise it would be difficult for the Special Rapporteur to assess the expectations of States. It might, moreover, be a subject in which progressive development based on general principles of law could play a more important role than codification. The Vienna Convention on the Law of Treaties of 1969 provided a useful frame of reference for unilateral acts, but the Commission should not be overinfluenced by the Convention, given the important differences between treaties and unilateral acts. SADC endorsed the recommendations contained in paragraph 621 (a), (b) and (c) of the report concerning further work on the topic.

73. With regard to the topic of reservations to treaties, he said that the provisions of the Vienna Convention laid the foundation for the law governing reservations but left many questions unanswered. The guidelines, with commentaries, being prepared by the Commission would be of considerable assistance to States. Those dealing with the distinction between reservations and interpretative declarations were particularly helpful, since in practice States often resorted to both devices in order to limit their treaty obligations. Moreover, the guidelines were instructive on procedures that could be followed to achieve the same results as reservations. In that regard, draft guideline 1.7, on alternatives to reservations and interpretative declarations, would be especially useful. Late reservations presented particular problems. The Special Rapporteur's proposals, which while acknowledging that the principle was not absolute,

respected the traditional view that a reservation could not be made after a State had expressed its consent to be bound, were a blend of good sense and flexibility.

74. The current debate concerning the competence of human rights monitoring bodies to pronounce on the compatibility of reservations with the object and purpose of the treaty, with the monitoring bodies holding one position and the Commission and several States the other, should be resolved sooner rather than later. The Special Rapporteur's suggestion that the Commission should consider the matter in 2001 was therefore welcome. By finding a solution reconciling the divergent views the Commission would be performing an invaluable service to the international community.

75. As for the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), the Special Rapporteur had adopted the correct approach: the draft articles should not be substantially revised, since States had already shown support for the text adopted on first reading. The Special Rapporteur had also rightly opted to retain the phrase "appropriate measures" in article 3 rather than the phrase "due diligence", which was notoriously unclear. Moreover, since the draft articles were designed to expound the principles of risk management, draft article 1 should be retained, for it made clear that the draft articles applied to activities not prohibited by international law.

76. Lastly, SADC suggested that the following topics should be the next for consideration by the Commission, assuming that the latter completed the second reading of the draft articles on State responsibility by the end of its 2001 session: responsibility of international organizations, which logically followed on from the topic of State responsibility; the effects of armed conflict on treaties, a particularly pertinent topic in view of the continuing conflict in the Great Lakes region and other parts of Africa; expulsion of aliens, a topic which would supplement the study of diplomatic protection; and the additional topic of the legal aspects of corruption and related practices.

The meeting rose at 12.30 p.m.